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The time period for reply, if any, is set in the attached communication.

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

_____

Ex parte CHRISTOPHER J. EDGE, WILLIAM A. ROZZI, and
TIMOTHY A. FISCHER

_____

Appeal 2008-006000
Application 09/534,824
Technology Center 2100

_____

Before LANCE LEONARD BARRY, ST. JOHN COURTENAY, III, and
CAROLYN D. THOMAS, *Administrative Patent Judges*.

COURTENAY, *Administrative Patent Judge*.

DECISION ON APPEAL[1]

_____

[1] The two-month time period for filing an appeal or commencing a civil
action, as recited in 37 C.F.R. § 1.304, or for filing a request for rehearing,
as recited in 37 C.F.R. § 41.52, begins to run from the "MAIL DATE"
(paper delivery mode) or the "NOTIFICATION DATE" (electronic delivery
mode) shown on the PTOL-90A cover letter attached to this decision.

STATEMENT OF THE CASE

Appellants seek our review under 35 U.S.C. § 134 of the Examiner's
final decision rejecting claims 1-27, 29-33, 35-39, and 41-50. Claims 28,
34, and 40 have been cancelled. We have jurisdiction over the appeal under
35 U.S.C. § 6(b).

We affirm-in-part.

INVENTION

Appellants' invention relates to digital color imaging. More
particularly, the invention on appeal is directed to modification of color
values in page description files. (Spec. 1).

ILLUSTRATIVE CLAIM

Claim 1 is illustrative:

> 1. A method for modification of color values in a page
> description file, the method comprising:
>
> identifying at least some implicit color commands within
> the page description file;
>
> converting the identified implicit color commands within
> the page description file to explicit color commands such that
> the explicit color commands replace the implicit color
> commands within the page description file; and
>
> modifying color values specified by the explicit color
> commands.

<center>PRIOR ART</center>

The Examiner relies upon the following references as evidence:

Vyncke   U.S. 5,926,185   July 20,1999

R.L. Henley, et al., *Concurrent PostScript Rasterizers Based High Throughput Color Printer Architecture*, IBM Technical Disclosure Bulletin, Vol. 40, No. 3, Doc. ID NN9703141, pp.1-2 (March 1997)(hereinafter "IBM").

Adobe Illustrator 8.0 (Help Section) *Using Gradients, Blends, and Patterns: Changing gradients, blends and patterns into filled objects*, pp.1-2 (cited in Applicants' 10/20/2000 IDS)(hereinafter "Illustrator").

<center>REJECTIONS</center>

Appellants appeal the following rejections:

1. The Examiner rejected claims 1, 2, 4-11, 13-19, 21-27, 29-33, 35-39, 41-43 under 35 U.S.C. § 103(a) as unpatentable over Vyncke and Illustrator.

2. The Examiner rejected claims 3, 12, 20, and 44-50 under 35 U.S.C. § 103(a) as unpatentable over Vyncke, Illustrator, and IBM.

<center>ISSUES</center>

Based upon our review of the administrative record, we have determined that the following issues are dispositive in this appeal:

1. Did the Examiner err by improperly combining the cited references under § 103?

2. Did the Examiner err in finding under § 103 that the combination of Vynck and Illustrator would have taught or suggested modifying color values specified by the explicit color commands, within the meaning of representative claim 1?

<center>3</center>

3. Did the Examiner err in finding under § 103 that the combination of Vyncke and Illustrator would have taught or suggested *modification of color values specified by the implicit color sub-commands*, as required by independent claims 26, 32, and 38?

FACTUAL FINDINGS

1. Appellants' Specification states that "[i]mplicit color commands specify color values indirectly, for example, by defining color as a function of other graphic information and color reference values." (Spec. 2, ll. 12-13).

2. Appellants' Specification states that "[a] 'blend' is an example of an implicit color command. A 'blend' may specify first and second endpoint color values, and define a shading function that generates intermediate color values ranging between the endpoint values based on pixel position. In this manner, a 'blend' command may call for generation of several intermediate color values, but explicitly define only the endpoint values." (Spec. 2, 17-21).

3. Vyncke teaches creating a color database (as PostScript commands are interpreted) that "contains, like a palette, all the colors used in the file." (Col. 5, ll. 47-50).

4. Vyncke teaches that the color database or palette does not contain any relationships between colors, such as a color and 50% of the same color, i.e., a tint, are listed in the database as distinct unrelated colors. (Col. 5, ll. 50-53).

5. Vyncke teaches a type of blend that is created between two colors where the intermediate colors are defined as separate colors that

gradually vary from one of the extreme colors to the other. (Col. 6, ll. 22-24).

6. Vyncke teaches applying a color mapping to blends to reduce the palette size where each of the intermediate colors of blends is defined in the color list as a mixture of the extreme colors of the blend. (Col. 6, ll. 19-20, 35-37).

7. Vyncke teaches analyzing the complete color palette for possible relationships between the colors to <u>eliminate redundancies</u> so as (according to one embodiment) to <u>reduce the number of inks</u> used for printing. (Col. 5, ll. 55-57 and Col. 6, ll. 55-57).

8. Illustrator teaches the use an "Expand Command" that converts the intermediate colors in a gradient or blend into a series of intermediate filled (i.e., single color) objects to overcome printing problems. (pp. 1-2).

9. IBM teaches defining a (color) translation from device to device by means of tables and procedures in a Color Rendering Dictionary in the PostScript Language. (p. 2).

GROUPING OF CLAIMS

Appellants argue claims 1, 2, 4-11, 13-19, and 21-25 as a group (App. Br. 8-12). We select representative claim 1 to decide the appeal for this group. *See* 37 C.F.R. § 41.37(c)(1)(vii).

Appellants argue claims 3, 12, and 20 as a group (App. Br. 13-15). We select representative claim 3 to decide the appeal for this group.

Appellants argue claims 44-46 as a group (App. Br. 15). We select representative claim 44 to decide the appeal for this group.

We consider claims 26-43 on the basis of independent claims 26, 32, and 38 *infra*.

Appellants do not present separate arguments for claims 47-49. (App. Br. 15).

Appellants argue claim 50 separately (App. Br. 15). We address claim 50 separately *infra*.

ANALYSIS

Issue 1

We decide the question of whether the Examiner erred by improperly combining the cited references under § 103. Appellants contend that Vyncke "teaches away" from the claimed invention because Vyncke relies on replacing an explicit color value with an implicit color command which is the opposite of converting implicit color commands to explicit color commands within the meaning of Appellants' claims. (App. Br. 9). Appellants further contend that the Examiner has failed to show a suggestion or motivation to combine the teachings of Vyncke and Illustrator. (App. Br. 9-11).

The Examiner responds that Illustrator was relied on to "give Vyncke the added ability to replace implicit color commands with explicit color commands (as is taught by Illustrator) so that the document would be appropriately modified to overcome printing problems." (Ans. 18). In particular, the Examiner notes that "both Vyncke in col. 1 line 56 - col. 2 line 12, and Illustrator at page 1, indicate that it is desirable to edit page description color commands to improve printing quality. Page 1 of

Illustrator teaches that the 'Expand' command can convert gradients, blends[2] or patterns into filled objects, and is particularly useful if one is having difficulty printing objects that contain gradients, blends or patterns." (Ans. 18, last paragraph).

At the outset, we acknowledge that "when the prior art teaches away from combining certain known elements, discovery of a successful means of combining them is more likely to be nonobvious." *KSR International Co. v. Telefex Inc.*, 550 U.S. 398, 416 (2007) (citing *United States v. Adams*, 383 U.S. 39, 51-52 (1966)). However, "more likely" is not dispositive. Thus, even if we assume *arguendo* that Vyncke and Illustrator do teach away in the manner argued by Appellants, that does not end our inquiry.

Here, we agree with the Examiner that the Vyncke and Illustrator (and IBM) references are each directed to the common purpose of overcoming color printing problems to improve printing quality. (*See* Ans. 18). Thus, we find the Vyncke, Illustrator, and IBM references are each directed to special situations presented by specific types of devices, such as different types of color printers. "As long as some motivation or suggestion to combine the references is provided by the prior art taken as a whole, the law does not require that the references be combined for the reasons contemplated by the inventor." *In re Beattie*, 974 F.2d 1309, 1312 (citations omitted). We also find the alternative approaches[3] to overcoming color

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[2] *Cf.* with Appellants' Specification, *see* FF 1 and FF 2: "[a] 'blend' is an example of an implicit color command."
[3] "[T]he prior art's mere disclosure of more than one alternative does not constitute a teaching away from any of these alternatives because such disclosure does not criticize, discredit, or otherwise discourage the solution claimed . . . ." *In re Fulton*, 391 F.3d 1195, 1201 (Fed. Cir. 2004).

printing problems taught by the three cited references would have been within the background knowledge possessed by a person having ordinary skill. (*See* FFs. 3-9; *see also* Note 2 *infra*).

Based upon our review of the record, we are of the view that Appellants' purported improvement over the prior art (regarding claims 1-25 and 44-50) represents no more than the predictable use of prior art elements[4] according to their established functions, and thus would have been obvious to one of ordinary skill in the art. *See KSR*, 550 U.S. at 417. ("[W]hen a patent 'simply arranges old elements with each performing the same function it had been known to perform' and yields no more than one would expect from such an arrangement, the combination is obvious.") (citing *Sakraida v. Ag Pro, Inc.*, 425 U.S. 273, 282 (1976)).

We are not persuaded that combining the respective familiar elements of the cited references in the manner proffered by the Examiner would have been "uniquely challenging or difficult for one of ordinary skill in the art" at the time of Appellants' invention (*see Leapfrog Enters. v. Fisher-Price, Inc.*, 485 F.3d 1157, 1162 (Fed. Cir. 2007) (citing *KSR*, 550 U.S. at 418)).

Lastly, we note that Appellants have not rebutted the Examiner's legal conclusion of obviousness by showing that the claimed combination of familiar elements produces any new function. Appellants have not provided any factual evidence of secondary considerations, such as unexpected or unpredictable results, commercial success, or long felt but unmet need.

Thus, when we take account of the inferences and creative steps that a

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[4] *e.g.,* explicit and implicit color commands found in a page description file.

person of ordinary skill in the art would have employed,[5] we find the
Examiner has articulated an adequate reasoning with a rational underpinning
that reasonably supports the legal conclusion of obviousness. Therefore, we
find Appellants' arguments unavailing regarding the combinability of the
cited references for essentially the same reasons proffered by the Examiner
in the Answer, and for the additional reasons discussed above. Accordingly,
we find the Examiner did not err by improperly combining the Vyncke and
Illustrator (and IBM) references under § 103.

<div align="center">Issue 2</div>

We decide the question of whether the Examiner erred by finding that
the combination of Vyncke and Illustrator would have taught or suggested
modifying color values specified by the explicit color commands, within the
meaning of representative claim 1.

Appellants attempt to support their contention with the following
statement:

> Vyncke et al. do not disclose modification of
> explicit commands of color values. To the extent that
> Illustrator may disclose the conversion of implicit

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[5] The conclusion of obviousness can be based on interrelated teachings of
multiple patents, the effects of demands known to the design community or
present in the marketplace, and the background knowledge possessed by a
person having ordinary skill in the art and an obviousness "analysis need not
seek out precise teachings directed to the specific subject matter of the
challenged claim, for a court can take account of the inferences and creative
steps that a person of ordinary skill in the art would employ." *KSR*, 550 U.S.
at 418. *See also DyStar Textilfarben GmbH & Co. Deutschland KG v. C.H.
Patrick Co.*, 464 F.3d 1356, 1368 (Fed. Cir. 2006).

> commands to explicit commands, the process of
> Illustrator is manually performed when a user is having
> difficulty with the printing. Nothing in Illustrator
> concerns the modification of color values.

(App. Br. 12).

We begin our analysis by observing that Appellants fail to provide
any <u>specific citation</u> to Vyncke or Illustrator to provide evidentiary support
for their statement. (*Id.*). Mere attorney arguments and conclusory
statements that are unsupported by factual evidence are entitled to little
probative value. *In re Geisler*, 116 F.3d 1465, 1470 (Fed. Cir. 1997); *see
also In re De Blauwe*, 736 F.2d 699, 705 (Fed. Cir. 1984); 37 C.F.R.
§ 1.111(b); and *Ex parte Belinne*, No. 2009-004693, slip op. at 7-8 (BPAI
Aug. 10, 2009) (informative), *available at*
http://www.uspto.gov/web/offices/dcom/bpai/its/fd09004693.pdf.

Moreover, Appellants' statement that "Vyncke et al. do not disclose
modification of explicit commands of color values" (App. Br. 12) appears to
be contravened by Appellants' previous statement that "Vyncke et al. rely on
replacing an explicit color value with an implicit color command." (App.
Br. 9, ¶4, first sentence). We find Vyncke teaches replacing an explicit
color value that involves modifying (i.e., removing) the associated explicit
color command (in the page description file) by replacing it with an implicit
color command so as to eliminate redundancies (e.g., to reduce the number
of inks required for a color print job). (FFs. 6-7).

We also find unpersuasive Appellants sweeping statement that
"[n]othing in Illustrator concerns the modification of color values." (App.
Br. 12). To the contrary, we find Illustrator teaches the use an Expand

Command that converts (i.e., modifies) the intermediate colors in a gradient or blend into a series of intermediate filled (i.e., single explicit color) objects to overcome printing problems. (FF 8). Lastly, we observe that Appellants have not filed a Reply Brief to further address the Examiner's responsive arguments. (*See* Ans. 19).[6]

On this record, we will sustain the Examiner's § 103 rejection of representative claim 1 over the combination of Vyncke and Illustrator.

Claims 2, 4-11, 13-19, and 21-25, not argued separately, fall therewith. *See* 37 C.F.R. § 41.37(c)(1)(vii).

<p align="center">Claims 3, 12, and 20</p>

Regarding dependent claims 3, 12, and 20, we have addressed the combinability of the cited references *supra*. We observe again that Appellants fail to provide any <u>specific citation</u> to Vyncke or Illustrator or IBM to provide evidentiary support for their statement in paragraph 3 on page 14 of the Brief. As discussed above, mere attorney arguments and conclusory statements that are unsupported by factual evidence are entitled to little probative value. *See Geisler*, 116 F.3d at 1470. On this record, we sustain the Examiner's § 103 rejection of representative claim 3 over the combination of Vyncke, Illustrator, and IBM. Claims 12 and 20 fall therewith. *See* 37 C.F.R. § 41.37(c)(1)(vii).

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[6] "Silence implies assent." *Harper & Row Publishers, Inc. v. Nation Enters.,* 471 U.S. 539, 572 (1985).

Issue 3

We decide the question of whether the Examiner erred by finding that
the combination of Vyncke and Illustrator would have taught or suggested
modification of color values specified by the implicit color sub-commands,
as required by independent claims 26, 32, and 38.

Appellants make the following contentions:

> In rejecting Claims 26, 32 and 38, the Examiner
> argues that Illustrator teaches the conversion of implicit
> color commands to implicit color sub-commands.
> However, for the rejections of Claims 1, 10 and 18, the
> Examiner argued that Illustrator teaches the conversion
> of implicit color commands to explicit color commands.
> Clearly, these arguments by the Examiner are mutually
> exclusive. In fact, the "expand" command discussed in
> Illustrator does not generate implicit sub-commands as
> required by Claims 26, 32 and 38. However, in the
> alternative, if the objects generated by Illustrator are
> construed by the Examiner as being implicit sub-
> commands, then they could not also be reasonably
> construed as explicit commands. The Examiner cannot
> attribute the same features of Illustrator to contradictory
> features of different claims. Either the rejections of
> [C]laims 1, 10 and 18 or the rejections of [C]laims 26, 32
> and 38 must be overruled given this contradiction in the
> Examiner's rationale.

(App. Br. 12-13).

The Examiner disagrees and responds that "Illustrator teaches
converting an identified implicit color command into a set of color sub-
commands in pages 1 and 2. The figure shows a gradient being transformed
into a set of colored band sub-commands which collectively represent the
former gradient implicit color command. The figure also shows a color

command being converted into a plurality of color sub-commands which are individually manipulated." (Ans. 20, ¶1).

We find Appellants' argument to be convincing, given that the Examiner has not clearly established in the record how the same portion of Illustrator can be relied on to teach both an explicit color command (claim 1) and also an implicit color sub-command within the meaning of independent claims 26, 32, and 38. *Cf.* Ans. 4: "Illustrator does teach converting an identified implicit color command into a set of <u>explicit color commands</u> in pages 1 and 2" with Ans. 9: "Illustrator does teach converting an implicit color command into a set of <u>color sub-commands</u> in pages 1 and 2." (underline added).

While we have sustained the Examiner's rejection of claim 1 for the reasons discussed *supra*, we will not sustain the Examiner's rejection of independent claims 26, 32, and 38 for the reasons argued by Appellants on pages 12-13 of the Brief. Accordingly, we reverse the Examiner's § 103 rejection of independent claims 26, 32, and 38 and also associated dependent claims 27, 29-31, 33, 35-37, 39, and 41-43.

Claims 44-46

Appellants attack the Examiner's rejection of claims 44-46 by merely stating that "[t]he Examiner's reliance on IBM is flawed because IBM is specifically concerned with rasterization of the PS file." (App. Br. 15). We find this argument unpersuasive for the following reasons: (1) the Examiner relies on Vyncke (and not IBM) for teaching that it is desirable to edit the commands of the page description language before the commands are sent to a raster image processor (Ans. 13), and (2) Appellants have provided no

specific citations to any of the references relied upon by the Examiner in support of their statement. (App. Br. 15).

As discussed above, mere attorney arguments and conclusory statements that are unsupported by factual evidence are entitled to little probative value. *See Geisler*, 116 F.3d at 1470. Moreover, arguments not made are waived. *See* 37 C.F.R. § 41.37(c)(1)(vii). *Cf. In re Baxter Travenol Labs.*, 952 F.2d 388, 391 (Fed. Cir. 1991) ("It is not the function of this court to examine the claims in greater detail than argued by an appellant, looking for nonobvious distinctions over the prior art.")

For these reasons, we sustain the Examiner's § 103 rejection of representative claim 44 over the combination of Vyncke, Illustrator, and IBM. Claims 45 and 46 fall therewith. *See* 37 C.F.R. § 41.37(c)(1)(vii).

Claims 47-49

Appellants do not present separate arguments for claims 47-49. (App. Br. 15). Instead, Appellants contend these claims should be allowed for at least the reasons previously advanced for independent claims 1, 20, and 18. (*Id.*) Because we did not find Appellants' arguments persuasive regarding claims 1, 20, and 18, we affirm the Examiner's rejection of claims 47-49 over the combination of Vyncke, Illustrator, and IBM for the same reasons discussed *supra* regarding claim 1.

Claim 50

Regarding claim 50, Appellants merely recite the language of the claim and assert "[n]othing in Vyncke et al., Illustrator or IBM suggests such features." (App. Br. 15). We find this statement lacks evidentiary support

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(i.e., specific citations and explanations regarding relevant portions of the references relied on by the Examiner). Therefore, we do not find Appellants conclusory statement to be persuasive of Examiner error.

For this reason, we also sustain the Examiner's § 103 rejection of claim 50 over the combination of Vyncke, Illustrator, and IBM.

DECISION

We affirm the Examiner's § 103 rejections of claims 1-25 and 44-50.

We reverse the Examiner's § 103 rejections of claims 26, 27, 29-33, 35-39, and 41-43.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a). *See* 37 C.F.R. § 1.136(a)(1)(2009).

ORDER

AFFIRMED-IN-PART

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